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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/612,687	07/01/2003	Scott Walter	191.0014901	4395
23445	7590	11/03/2005		
THE BILICKI LAW FIRM, PC 1285 North Main Street JAMESTOWN, NY 14701			EXAMINER KLEBE, GERALD B	
			ART UNIT	PAPER NUMBER
			3618	

DATE MAILED: 11/03/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

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Advisory Action
Before the Filing of an Appeal Brief

Application No.

10/612,687

Applicant(s)

WALTER, SCOTT

Examiner

Gerald B. Klebe

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--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 26 September 2005 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: None.
Claim(s) objected to: None.
Claim(s) rejected: 61-98.
Claim(s) withdrawn from consideration: None.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☒ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☐ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:

12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____

13. ☒ Other: Refer to attachment for further explanation.

G.B. Klebe
31 Oct 2005

**ATTACHMENT in further EXPANATION: ADVISORY ACTION BEFORE FILING OF
AN APPEAL BRIEF**

Affidavit or Declaration under 37 CFR 1.131: Ineffective

1. The Reply and Request for Reconsideration filed 09/26/2005 and the Supplemental Amendment to Reply and Request for Reconsideration filed 10/25/2005 under 37 CFR 1.131 have been considered but are ineffective to overcome the US2002/0077222 reference (Daly 2002-222) used in rejections under 35 USC § 103(a) of all pending claims 61-98 of the application (Final Rejection Office Action mailed 07/25/2005).

Relative to the rejections under 35 USC § 103(a) of the Office Action mailed 07/25/2005, Applicant's Reply and Reconsideration and Supplemental Amendment thereto provide declarations made under 37 CFR § 1.131 by (a) the inventor Scott Walter (Exhibit A of the Reply filed 09/26/2005) and, (b) by the father of the inventor, Mr. David A. Walter (Exhibit D of the Supplemental filed 10/25/2005).

These declarations fail to provide sufficient evidence of conception and of reduction to practice of the invention as required under 37 CFR § 1.131 as explained following. Refer MPEP § 715.07; 715.07(a); and 2138.04 through 2138.06.

Insufficient Evidence of Conception

2. The evidence submitted is insufficient to establish a conception of the invention prior to the effective date of the Daly (2002-222) reference. While conception is the mental part of the inventive act, it must be capable of proof, such as by demonstrative evidence or by a complete disclosure to another. Conception is more than a vague idea of how to solve a problem. The

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requisite means themselves and their interaction must also be comprehended. See *Mergenthaler v. Scudder*, 1897 C.D. 724, 81 O.G. 1417 (D.C. Cir. 1897). The declarations provide no such corroborative evidence.

A declaration by the inventor to the effect that his or her invention was conceived or reduced to practice prior to the reference date, without a statement of facts demonstrating the correctness of this conclusion, is insufficient to satisfy 37 CFR 1.131.

37 CFR 1.131 requires that original exhibits of drawings or records, or photocopies thereof, accompany and form part of the affidavit or declaration or their absence satisfactorily explained. If the applicant made sketches he should so state, and produce and describe them; if the sketches were made and lost, and their contents remembered, they should be reproduced and furnished in place of the originals. If neither sketch nor models are relied upon, but it is claimed that verbal disclosures, sufficiently clear to indicate definite conception of the invention, were made, the witness should state as nearly as possible the language used in imparting knowledge of the invention to others. In *Ex parte Donovan*, 1890 C.D. 109, 52 O.G. 309.

Insufficient Evidence of Reduction to Practice

3. The evidence submitted is insufficient to establish a reduction to practice of the invention in this country or a NAFTA or WTO member country prior to the effective date of the Daly (2002-222) reference. The declarations provide no corroborative evidence.

In general, proof of actual reduction to practice requires a showing that the apparatus actually existed and worked for its intended purpose. However, there are some devices so simple that a mere construction of them is all that is necessary to constitute reduction to practice.

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Photographs, coupled with articles and/or a report and evidence showing the features of the device may be sufficient to constitute evidence of reduction to practice of such a simple device.


Conclusion

4. Any inquiry concerning this or earlier communication(s) from the examiner should be directed to Gerald B. Klebe at 571-272-6695; Mon.-Fri., 8:00 AM - 4:30 PM ET, or to Supervisory Patent Examiner Christopher P. Ellis, Art Unit 3618, at 571-272-6914.

Official correspondence should be sent to the following TC 3600 Official number as follows: 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


gbklebe / Art Unit 3618 / 31 October 2005


CHRISTOPHER P. ELLIS
SUPERVISORY PATENT EXAMINER
ELECTRONIC BUSINESS CENTER 3600